No. 15007

United States
Court of Appeals
for the Ninth Circuit

BENMATT ORGANIZATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —4-2-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 16905-BH

BENMATT ORGANIZATION, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(For refund of Manufacturers Excise Tax)

Comes now the above named plaintiff and for cause of action against the above named defendant, alleges:

I.

Plaintiff is a corporation incorporated under the laws of the State of California, having its principal place of business at 3447 East Fifteenth Street, Los Angeles 23, California.

II.

Harry C. Westover, hereinafter referred to as Collector Westover, was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth Collection District of California from July 1, 1943 to October 31, 1949, inclusive. Robert A. Riddell, hereinafter referred to as Collector Riddell, was the duly appointed, qualified and acting Collector of Internal Revenue for said district from November 1, 1949, to April 30, 1950, inclusive, and was the duly appointed, qualified and acting Collector of Internal Revenue for said district from

May 1, 1950, to November 25, 1952, inclusive, and at all times from, and including November 26, 1952, has been and is now Director of [2] Internal Revenue, Los Angeles district, State of California.

III.

At all times prior to November 1, 1947, to March 31, 1951, inclusive, plaintiff was engaged in the business of manufacturing and selling, among other things, automobile dealer identification plates in California and throughout the United States. This business was conducted at 3447 East Fifteenth Street, Los Angeles 23, California, under its own name.

IV.

Within the time prescribed by law, plaintiff duly filed with the incumbent Collector, or acting Collector, of Internal Revenue for the Sixth District of California, at Los Angeles, a manufacturers excise tax return for each calendar month in the period from November 1, 1947, to March 31, 1951. Plaintiff reported in these returns receipts from certain of its operation (manufacture and sale of automobile dealer identification plates) as being subject to the manufacturers excise tax imposed by Section 3403 of the Internal Revenue Code. Accompanying each such return, plaintiff transmitted to said Collector a check in payment of the amount shown on the return as such manufacturers excise tax for the month in question. The amount so paid for each month, the date of the check issued in payment and the month for which the payment was

made are set forth in the schedule attached hereto as Exhibit "A" and hereby made a part hereof.

V.

Plaintiff, by such monthly payments, beginning November 1, 1947, and ending March 31, 1951, inclusive, paid manufacturers excise taxes in the sum of $98,747.04 under Section 3403 of the Internal Revenue Code on automobile dealer identification plates manufactured and sold by it. Said sum was duly assessed by the Commissioner of Internal Revenue on plaintiff's returns during the period involved herein.

VI.

Plaintiff alleges that the taxes so paid on amounts received on account of its sale of automobile dealer identification plates from November 1, [3] 1947, to March 31, 1951, inclusive, were erroneously and illegally paid and collected and that plaintiff is entitled to a refund thereof.

VII.

Plaintiff alleges that the automobile dealer identification plates manufactured and sold by it from November 1, 1947, to March 31, 1951, inclusive, were manufactured and sold to automobile dealers solely for advertising purposes and do not constitute automobile parts or accessories within the meaning of Section 3403 of the Internal Revenue Code; that the plates were sold upon special order and gave the name and address of the automobile dealer for the

purpose of identifying and advertising the dealer's place of business; that the automobile dealer's name was molded into the plate and could not be changed so as to permit any other dealer to use the name; and that the automobile dealers directly charged the cost of such plates to advertising expense on their accounting records.

VIII.

On or about December 31, 1951, plaintiff duly filed with the Collector, Robert A. Riddell, at Los Angeles, California, a duly executed claim for refund in the amount of $98,747.04, theretofor paid by the plaintiff as manufacturers excise tax on account of certain of its operations in the months of November 1947 to March 1951, inclusive, as set forth above; that said claim for refund was filed on official Form 843 within the time and in the manner provided by law, and stated it should be allowed for the following reasons:

"The Commissioner of Internal Revenue has erroneously and illegally collected manufacturers Excise Tax pursuant to provisions of Section 3403, I.R.C., on automobile dealer identification plates sold by the deponent during the period November 1947 to March 1951, inclusive. These identification plates are sold primarily for advertising purposes and do not constitute automobile parts or accessories within the meaning of [4] Section 3403 of Internal Revenue Code. For detail of sales and of payment and amount of refund per month see schedule attached hereto and made a part hereof."

IX.

By registered mail, notice dated August 5, 1952, the Commissioner of Internal Revenue notified plaintiff of the disallowance in full of the refund claim filed by it as set forth above. No part of the taxes represented and paid by plaintiff from November 1, 1947, to March 31, 1951, inclusive, has been refunded to the plaintiff.

X.

Plaintiff included the manufacturers excise tax in the price of automobile dealer identification plates and passed such tax on to the ultimate purchaser, namely, the automobile dealers.

XI.

Plaintiff, prior to filing this complaint and as a prerequisite to bringing this suit, filed with the Commissioner of Internal Revenue written consents, duly executed by the ultimate purchaser (automobile dealers) to allowance of such refunds in the amount of $38,284.84, in compliance with the provisions of Section 3443 (d) of the Internal Revenue Code. $8,501.78 of this amount was paid to Collector Westover during the months of November 1947 to October 31, 1949, inclusive.

XII.

No part of the manufacturers excise taxes reported and paid by plaintiff to Collector Westover for the months of November 1947 to October 31, 1949, inclusive, has been refunded to plaintiff. There

is now due and owing from defendant to plaintiff $8,501.78 as taxes illegally paid by and collected from plaintiff as set forth above, together with interest on said sum as provided by law.

Wherefore, plaintiff prays judgment in favor of plaintiff and against defendant as follows: [5]

1. For the sum of $8,501.78 for said taxes erroneously and illegally collected from it and not refunded, together with interest on said sum as provided by law.

2. For plaintiff's cost of suit and for such other and furnther relief as may be just and proper in the premises.

Dated this 1st day of July, 1954, Los Angeles, California.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [6]

Duly Verified. [8]

[Endorsed]: Filed July 7, 1954.

EXHIBIT "A"

THE HERBERT ORGANIZATION, INC.
3447 East 19th Street Los Angeles 23, Calif.

STATEMENT OF SALES TAX PAID

...QE	Amount Paid Per Return	Date Paid	Total Gross Sales	Taxable Sales (Incl. Luggage Coverlets)	Non-Taxable Gross Sales	Tax Should Be	Tax Overpaid
'47	$ 2,008.93	12-30-47	$ 40,845.07	$ 4,746.89	$ 36,098.18	$ 237.34	$ 1,771.64
'47	1,934.97	1-27-48	38,125.91	6,191.34	31,824.37	309.58	1,624.99
'48	2,052.93	2-23-48	40,999.36	4,511.82	36,087.54	225.59	1,827.34
	2,144.26	3-16-48	42,708.37	6,587.83	36,047.22	329.39	1,814.87
	3,007.60	4-27-48	99,318.19	7,024.84	92,247.34	351.24	2,656.36
	2,238.63	5-28-48	44,595.36	7,021.97	37,573.99	351.08	1,887.55
	2,255.56	6-29-48	44,954.51	6,207.53	38,746.98	310.38	1,945.18
	1,973.67	7-30-48	38,945.69	4,798.44	34,147.25	239.92	1,733.75
	2,010.44	8-27-48	40,087.72	5,705.24	34,382.48	285.26	1,725.18
	2,867.08	9-28-48	58,383.99	8,795.98	49,588.01	439.80	2,427.28
F	2,067.02	10-23-48	41,425.10	6,242.73	35,182.37	312.14	1,754.88
	1,799.87	11-30-48	36,052.67	8,016.77	28,035.90	400.84	1,399.03
	2,053.55	12-27-48	41,488.30	6,579.48	34,908.82	328.97	1,724.58
	2,540.49	1-28-49	51,005.05	9,106.97	41,898.08	455.35	2,085.14
'49	2,760.65	3-25-49	60,237.75	8,948.54	49,924.08	447.43	2,313.22
	2,480.80	3-28-49	51,369.49	10,087.19	40,634.02	504.36	1,976.44
	3,420.40	4-25-49	73,744.95	11,989.75	61,755.20	599.49	2,820.91
	3,880.61	5-27-49	80,530.18	3,496.51	76,767.42	174.83	3,705.78
	2,500.61	6-29-49	51,793.77	3,205.35	50,157.02	160.27	2,340.34
	2,251.80	7-19-49	39,369.88	11,279.90	36,516.28	564.00	1,687.80
	2,314.85	8-30-49	38,195.68	9,886.36	36,855.18	494.32	1,820.53
	2,382.91	9-26-49	43,020.64	9,980.32	38,045.96	499.02	1,883.89
F	2,438.87	10-28-49	47,804.17	5,295.01	44,626.20	264.75	2,174.12
	2,194.45	11-30-49	44,005.34	4,547.93	40,279.12	227.40	1,967.05
	2,595.47	12-21-49	52,355.19	3,045.51	49,458.72	152.28	2,443.19
	3,942.15	1-13-50	79,183.31	4,619.05	74,595.28	230.95	3,711.20
'50	3,194.02	2-21-50	63,522.56	5,345.09	58,405.19	267.25	2,926.77
	2,938.78	3-20-50	58,269.44	7,228.73	51,962.75	361.44	2,577.34
	3,000.00	4-21-50	56,598.29	10,021.88	49,560.12	501.09	2,498.91
	3,199.65	5-24-50	62,243.44	12,629.33	51,302.48	631.47	2,568.18
	3,727.17	6-21-50	69,921.97	15,966.30	58,805.28	798.32	2,928.85
	3,681.66	7-25-50	68,743.68	15,268.44	53,279.66	763.42	2,918.24
	3,227.40	8-28-50	57,461.03	13,161.67	51,338.85	658.08	2,569.32
	3,641.14	9-27-50	62,911.58	18,381.04	51,604.57	919.05	2,722.09
F	2,609.91	10-24-50	49,750.72	7,648.48	43,256.30	382.42	2,227.49
	3,554.08	11-22-50	65,795.15	7,786.86	59,561.07	389.34	3,164.74
	3,234.79	12-26-50	66,442.40	14,223.64	53,158.77	711.18	2,523.61
	3,174.31	1-24-51	59,561.00	12,322.07	50,946.91	616.10	2,558.21
'51	4,294.45	2-27-51	83,451.43	14,520.49	70,946.06	726.02	3,568.43
	5,669.24	3-28-51	107,969.52	22,919.75	90,016.71	1,145.99	4,523.25
	4,243.54	4-26-51	74,892.22	19,883.36	64,178.59	994.17	3,249.37
L S	$ 117,508.36		$ 2,287,680.27	$ 375,226.18	$ 1,989,706.32	$ 18,761.32	$ 98,747.04

avers that for the period November 1947 through

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and, in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Admits the allegations contained in paragraph III of the complaint and avers that the plaintiff also manufactured and sold automobile license plate frames, some of which bore the name of an automobile dealer.

IV.

Denies the allegations contained in paragraph IV of the complaint except admits that the plaintiff duly filed manufacturers [9] excise tax return for each calendar month from November 1947 through March 1951 except for the month of March of 1948 and further admits that the taxes reported on each of the returns so filed were paid.

V.

Denies the allegations in the first sentence of paragraph V of the complaint except admits or avers that for the period November 1947 through

March 1951, the plaintiff paid manufacturers excise taxes on automobile license plate frames pursuant to Section 3403 of the Internal Revenue Code in the amount of $114,500.76.

VI.

Denies the allegations contained in paragraph VI of the complaint.

VII.

Denies the allegations contained in paragraph VII of the complaint except denies any knowledge or information sufficient to form a belief as to the plaintiff's method of manufacturing automobile license plate frames or as to the accounting procedures of plaintiff's customers.

VIII.

Admits the allegations contained in paragraph VIII of the complaint except denies the allegations quoted from the claim for refund.

IX.

Admits the allegations contained in paragraph IX of the complaint.

X.

Denies the allegations contained in paragraph X of the complaint except admits or avers that the plaintiff included the manufacturers excise tax in the price of automobile license plate frames and passed such tax on to the ultimate purchaser; however, [10] defendant denies any knowledge or in-

formation sufficient to form a belief as to who the ultimate purchasers were.

XI.

Defendant has no knowledge or information sufficient to form a belief as to who the ultimate purchasers of the taxed articles were and hence denies the truth of the allegations contained in paragraph XI of the complaint except that defendant admits that the plaintiff filed written consents in certain amounts executed by some certain parties.

XII.

Admits the allegations contained in the first sentence of paragraph XII, but denies the allegation contained in the second sentence of that paragraph.

Wherefore, having fully answered, defendant prays for judgment in its favor and for its costs and disbursements in this action.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax Division
BRUCE I. HOCHMAN,
Asst. U. S. Attorney
/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant [11]

Affidavit of Service by Mail attached. [12]

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Causes Nos. 16905-6.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts may be taken to be true, subject to the right of either party to object to the materiality, relevancy or competency of any of the matters set forth herein and subject to the further right of any party to explain, amplify any of the matters set forth herein.

I.

The automobile dealers who have signed the Statements of Ultimate Consumers upon which this refund suit is based, are, in fact, the ultimate consumers of license plate frames upon which the excise tax was imposed.

II.

The automobile dealers who have signed the Statements of Ultimate Consumers did not resell the frames.

III.

The automobile dealers who have purchased the license plate frames involved in this suit treated the cost of such frames as an [13] advertising or other expense on their respective books and records, and did not charge their customers for them.

IV.

A few automobile dealers whose claims are not involved in the case at bar did sell a few of the

frames herein involved and designated as Exhibit 1-a post.

V.

There will be offered into evidence three license plate frames, which are indicative of the types of frames manufactured and sold by the plaintiff. These are marked Plaintiff's Exhibit 1-a, 1-b and 1-c and are described as follows: 1-a: License plate frames involved in this refund suit; 1-b: License plate frames bearing the name of a particular state not sued upon by plaintiff; and 1-c: License plate frames bearing no identification as to dealer, city, or other thing or person, not sued upon by plaintiff.

VI.

There will be offered into evidence, as Plaintiff's Exhibit 2, a copy of a typical billing to an automobile dealer (Ultimate Consumer) for license plate frames, which shall be regarded as a typical billing for all the frames involved in this suit.

VII.

The refund claims sued upon were timely and properly filed.

VIII.

If the General Manager of Pep Boys, Western Auto Supply, or Sears Roebuck and Co., which concerns among other things deal in auto accessories, took the stand in this case and was sworn, he would testify as follows:

(a) That his firm handles the license plate frames which are marked plaintiff's Exhibit 1-b and 1-c;

(b) That such frames are sold to their customers in the normal course of their business; and

(c) That these frames designated as plaintiff's Exhibits 1-b and 1-c are advertised by the above [14] firms as commodities to be purchased for the adornment of automobiles, the protection of license plates, and the complementing of the chrome otherwise to be found on the automobile.

Dated this 8th day of September, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney, Chief, Tax Division

BRUCE I. HOCHMAN,
Assistant U. S. Attorney

/s/ BRUCE I. HOCHMAN,

Attorneys for United States of America

RILEY & HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [15]

[Endorsed]: Filed September 9, 1955.

[Endorsed]: Plaintiffs' Exhibit No. 3, Filed September 12, 1955.

[Title of District Court and Causes Nos. 16905-6.]

OPINION

Appearances: Riley and Hall, B. H. Neblett, William T. Huston, Attorneys for Plaintiff. Laughlin E. Waters, U. S. Attorney, Edward R. McHale, Bruce I. Hochman, Asst. U. S. Attorneys, Attorneys for Defendant. [16]

These two consolidated actions involve manufacturers' excise taxes from November 1, 1947, through March 31, 1951, in the amount of $38,284.84, together with interest as provided by law. The sole question involved is whether license plate frames bearing an advertisement are "automobile accessories" within the meaning of §3403(c) of the Internal Revenue Code of 1939 [now §§4061, 4062 and 4063 of the Internal Revenue Code].

Section 3403 at the time these excise taxes became due provided as follows:

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts

of, any of the articles enumerated in subsection (a) or (b) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *"

Treasury Regulation 46 (1941), §316.55, restated in Federal Tax Regulations (1955) at page 1176, provides in part as follows:

"(a) The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, or [17] automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

"(b) The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. * * *"

Plaintiff without dispute is the manufacturer of

three types of license plate frames. One type is for dealers advertising the dealer's name, the second has the name of the state or city, and the third is plain.

Plaintiff only seeks a refund on the first type. It has paid excise taxes on the second and third kind.

It contends that the first type is an advertising device and therefore cannot come within the purview of an automobile accessory inasmuch as the dealer-purchaser gives the frames to his customers without charge.

The evidence in this case discloses that automobile license frames can be purchased at any automobile accessory store, which in itself indicates their classification by the trade.

In Masterbilt Products Corp. vs. U. S. A., 42 F.Supp. 294, the Court of Claims stated:

"The Supreme Court in the case of Universal Battery Co. vs. United States, 281 U.S. 580, 584, 50 S.Ct. 422, 423, 74 L.Ed. 1051, prescribed a rule for determining what devices were subject to tax. This rule was as follows: '* * * It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.' "

[See also Words and Phrases under definition of "accessory" as well as Webster's Dictionary].]18]

It appears to me that the license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to auto-

mobiles by bolts, add to the utility and become a component part of the automobile as well as an ornament.

License plate frames are in common use and are as familiar to an automobile user as any other part of the vehicle. They also protect the license plate from the elements and prevent vibration. It is my view that the use of frames is so widely known that the court can take judicial notice of their utility and use as well as the ornamentation [Cadwalader vs. Zeh, 151 U.S. 171, 176, 14 S.Ct. 288, 38 L.Ed. 115.]

The plaintiff has recognized that frames without the advertising matter inserted on the body of the frames are subject to the tax by paying the same and not seeking a refund. But, the plaintiff contends that because the frame is given to the purchaser of an automobile without charge by the seller of the motor vehicle, providing it carries an advertisement designating the name of the dealer, it is no longer an accessory but an advertisement for the benefit of the seller.

To put the same more clearly, plaintiff contends that an accessory ceases to be an accessory when an advertising plate is affixed thereto. Hub caps would be exempt under the same theory. A package of matches continues to be a package of matches notwithstanding the package carries an advertisement.

Plaintiff places great reliance upon Smith vs. McDonald, 214 F.2d 920. In that case plaintiff manufactured an electric sign designed to be at-

tached by suction cups to the tops of taxicabs. The signs were [19] illuminated by electric bulbs and were purchased only by taxicab operators. The sign indicated whether the taxicab was vacant or other information that would be sought by prospective customers. The court held that the signs on taxicabs were analogous to the character for use of taxicab meters on taxicabs and were not subject to excise tax as an automobile accessory. With this holding we have no quarrel but fail to see its application to this case. It must be remembered that each case depends upon the particular facts under consideration. [Cuno Engineering Corporation vs. United States, 43 F.2d 259, 262.]

A license plate frame is a license plate frame whether it bears an advertisement or not. A rose by another name does not cease to be a rose.

Plaintiff has overlooked the fact that we are dealing with an excise tax on the manufacturer, which in effect is a sales tax at the source not a retailer's sales tax. The tax is on the sale price of the manufactured article and not on the use it is put to by the dealer-purchaser. The manufacturer makes these frames for a purpose and a price. Whether the dealer-purchaser gives them to his customers or sells them is immaterial to any issue in this case. [Williams vs. Harrison, 110 F.2d 989; 51 Am. Juris. p. 61; 33 C.J.S. p. 111.]

Plaintiff shall take nothing by reason of these actions and defendant is entitled to a judgment of dismissal. Counsel for defendant is directed to pre-

pare and submit to me within ten days its proposed findings and judgment.

Dated: This 3rd day of October, 1955.

/s/ BEN HARRISON,
Judge [20]

[Endorsed]: Filed October 3, 1955.

[Title of District Court and Cause No. 16905.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th day of September, 1955, before the Honorable Ben Harrison, sitting without a jury; plaintiff appearing by its attorneys Riley and Hall, by B. H. Neblett and William Huston, Esquires, and the defendant appearing by its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney; and evidence both oral and documentary having been received and the Court having fully considered the same, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The plaintiff is a corporation incorporated under

the laws of the State of California, having its principal place of business at 3447 E. 15th Street, Los Angeles 23, California. [21]

II.

At all times prior to November 1, 1947, to March 31, 1951, inclusive, the plaintiff was engaged in the business of manufacturing and selling, among other things, license plate frames for sale in California and throughout the United States.

III.

Plaintiff, by monthly payments beginning November 1, 1947, and ending March 31, 1951, inclusive, paid manufacturer's excise taxes in the sum of $98,747.04 to the Commissioner of Internal Revenue who had assessed this said sum on plaintiff's returns during the periods involved herein.

IV.

On or about December 31, 1951, plaintiff duly filed with the Collector Robert A. Riddell at Los Angeles, California, a duly executed claim for refund in the amount of $98,747.04, on August 5, 1952, said claim for refund was disallowed in full by the Commissioner of Internal Revenue. Plaintiff obtained written consents from ultimate purchasers to an allowance of such refunds in the amount of $38,284.84. Of this amount, $8,501.78 was paid to Collector, Harry C. Westover, during the months of November, 1947 to October 31, 1949, inclusive.

V.

Plaintiff is the manufacturer of three types of license plate frames. One type is for dealers advertising the dealer's name and products; the second has the name of the city or state; and the third is plain. Plaintiff only seeks a refund for taxes paid relative to the first type of frame, namely, the one that has the dealer's name upon it.

VI.

The automobile dealers who purchased license plate frames for advertising with their names upon them were the ultimate consumers and purchasers and did not charge their customers for the frames. The cost to the automobile dealers was reflected as an "advertising [22] expense" or "other expense" on their books and records.

VII.

The tax imposed is on the manufacturer's sale price of the manufactured article and whether the ultimate purchaser sells them or gives them away has no bearing on the tax liability of the manufacturer.

VIII.

The license plate frames in dispute are primarily adapted for use on motor vehicles. They are constructed to be affixed to automobiles by bolts, add to the utility, and become a component part of the automobile as well as an ornament. They also protect the license plate from the elements and prevent vibration.

IX.

The license plate frames which have the name of a state or city or which are plain can be purchased at any automobile accessory store. This indicates Exhibits 1-b and 1-c classification by the trade.

X.

A license plate frame remains a license plate frame whether it bears an advertisement or not.

XI.

The license plate frame with the dealer's name upon it is merely a frame with advertising molded into it, and is, and remains an automobile accessory under Section 3403(c) of the Internal Revenue Code of 1939.

Conclusions of Law

I.

The license plate frames with the dealers' names upon them are automobile accessories under Section 3403(c) of the Internal Revenue Code of 1939 and the Government was correct in collecting and in refusing to refund the excise tax attributable to their [23] manufacture and sale by plaintiff manufacturer.

II.

Plaintiff has failed to prove that defendant illegally collected from plaintiff and now owes plaintiff the sum of $8,501.78 or any sum whatever.

III.

Defendant is entitled to judgment that plaintiff

take nothing, that the action be dismissed with prejudice and that it receive its costs.

Dated: This 24 day of October, 1955.

/s/ BEN HARRISON,
United States District Judge [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Lodged October 11, 1955. Filed October 24, 1955.

[Title of District Court and Causes Nos. 16905-6.]

OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff objects to the proposed Findings of Fact and Conclusions of Law submitted by the defendant in the above proceedings in the following particulars:

1. Amend Finding No. 5 by adding to the first clause of the second sentence, line 24, page 2, the words, "and products".

2. Finding No. 7 is objected to on the ground that it is a conclusion of law, argumentative, and not responsive to any material issue raised by the pleadings. [26]

3. Finding No. 8 is objected to on the ground that it does not conform to the agreed stipulation of facts, but is inconsistent and in conflict therewith; that there is no evidence in the record that the

license plate frames advertising the automobile dealer's business, wares, and products are:

"* * * constructed to be affixed to the automobile by bolts add to the utility, and become a component part of the automobile as well as an ornament; They also protect the license plate from the elements and prevent vibration."

The alleged finding of fact quoted above represents conclusions of law, and, further, are based on alleged facts that are incompetent, irrelevant and immaterial to any issue in this proceeding. See Preface to Stipulation of Facts and page 8 of Plaintiff's Brief.

It will be noted that Plaintiff reserved the right in the agreed stipulation of facts to object to the materiality, relevancy, or competency of any matters set forth therein. Exhibits 1-b, and 1-c referred to in Paragraph 5 and Paragraph 8, and all of Paragraph 8, were objected to at the hearing, and in Plaintiff's Brief, and is now objected to on the ground that the sale of those items by Pep Boys and other firms, can have no conceivable relation to the issue in these proceedings. Plaintiff's claim for refund is based entirely on Exhibit 1-a (Automobile License Plate Frames) which advertise the dealer's name, business, wares, and products. Exhibit 1-b and 1-c do not pertain to Plaintiff's business in any way. The Court has not specifically ruled on Plaintiff's objection to the alleged evidence contained in Paragraph 5 and Paragraph 8 of the agreed stipulation of facts. Plaintiff respectfully requests the Court to specifically rule on said objection prior to

approving the findings of fact and conclusions of law herein.

4. Finding No. 9 is objected to on the ground that it is indefinite, uncertain, and ambiguous, and has no relevancy to any issue in the case. It is not clear whether such finding refers to Exhibits 1-a, 1-b, and 1-c or just to Exhibits 1-b and 1-c. Moreover, the last two sentences in the proposed finding are conclusions of law. [27]

5. Finding No. 10 is objected to on the ground that it is not responsive to any material issues in these proceedings, is not a finding of an ultimate fact, but in the nature of a conclusion of law.

6. Finding No. 11 is objected to on the ground that in its present form, it is a pure conclusion of law and does not conform to the agreed stipulation of facts, but is inconsistent therewith. The agreed facts show that the license frames (Exhibit 1-a) advertising the dealer's name, wares and products are specifically made for such dealer, and that his name and products are molded into the license frames.

7. Findings No. 7 to 11, inclusive, are objected to on the further ground that the alleged finding of fact and conclusions of law are intermingled and not separately stated as required by the Court's rules.

8. Amend Conclusions of Law, Paragraph 1, line 29, page 3, to line 1, page 4, inclusive, to read as follows:

"The license plate frames advertising the automobile dealer's name and products are automobile

accessories under Section 3403(c) of the Internal Revenue Code of 1939, and the Government was correct in collecting and refusing to refund the excise tax attributable to their manufacture and sale by plaintiff manufacturer."

Dated this 14th day of October, 1955.

Respectfully submitted,

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [28]

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Causes Nos. 16905-6.]

ORDER OVERRULING PLAINTIFF'S OBJECTION TO CERTAIN EVIDENCE RECEIVED AT THE HEARING

It is by the Court

Ordered, that Plaintiff's objections to the materiality, relevancy, or competency of Exhibits 1-b and 1-c referred to in paragraph 5 and paragraph 8, and the remaining statements in paragraph 8, of the Agreed Stipulation of Facts are hereby overruled.

Dated October 24, 1955.

/s/ BEN HARRISON,
United States District Judge [30]

[Endorsed]: Filed October 25, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 16905-BH

BENMATT ORGANIZATION, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of September, 1955, before the Honorable Ben Harrison, sitting without a jury; plaintiff appearing by its attorneys Riley and Hall, by B. H. Neblett and William Huston, Esquires, and the defendant appearing by its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney; and evidence both oral and documentary having been received and the Court having considered the same and having made and duly entered its Findings of Fact and Conclusions of Law herein;

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing in the above-entitled action and that defendant have judgment for and shall recover from plaintiff the

amount of defendant's costs to be taxed by the Clerk of this Court in the sum of $20.00. [31]

Judgment rendered this 24 day of October, 1955.

/s/ BEN HARRISON,
United States District Judge [32]

[Endorsed]: Lodged October 11, 1955. Filed October 24, 1955.

[Title of District Court and Cause No. 16905.]

NOTICE OF APPEAL

Notice is hereby given that Benmatt Organization, Inc., plaintiff, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 25, 1955.

Dated: December 13, 1955.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [33]

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause No. 16905.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, the Plaintiff in the above-entitled action is about to appeal to the United States Court of Appeals, Ninth Circuit, from a judgment entered

against it in said action, in said United States District Court, in favor of the Defendant in said action, on the 25th day of October, 1955.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned The Ohio Casualty Insurance Company, a corporation duly organized and existing under the laws of the State of Ohio, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all costs which may be awarded against the Plaintiff on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledged itself bound.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its Attorney-in-Fact, this 13th day of December, 1955.

[Seal] THE OHIO CASUALTY INSURANCE COMPANY,

/s/ By CHARLOTTE H. BARR,
Attorney-in-Fact [35]

Affidavit of Attorney-in-Fact for Surety attached.

[Endorsed]: Filed December 16, 1955.

Title of District Court and Causes Nos. 16905-6.]

STATEMENT OF POINTS

The points upon which Appellant intends to rely n this Appeal are as follows:

1. The Court erred in holding that Plaintiff is manufacturer of automobile parts or accessories ithin the meaning of Section 3403(c) of the 1939 ode and Treasury Regulation 46 (1941 Edition, ection 316.55).

2. The Court erred in holding that the license late frames, designed to advertise the automobile ealer's business wares and products are automobile ccessories within the meaning of Section 3403(c) f the 1939 Code, Treasury Regulation 46 (1941 dition, Section 316.55). [36]

3. The Court erred in refusing to hold that the icense plate frames were specifically made for in- ividual automobile dealers with the name of deal- r's business and products molded into them, repre- ented the sale of labor and material and were not he sale of such frames as "automobile accessories".

4. The Court erred in overruling Plaintiff's ob- ection to the materiality, relevancy or competency o any issue herein of Exhibits 1-b and 1-c referred o in paragraph 5 and paragraph 8 and the remain- ng statements contained in (a), (b) and (c) of aragraph 8 of the Stipulation of Facts.

Dated: This 11th day of January, 1956.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [37]

Affidavit of Service by Mail attached. [38]

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Causes Nos. 16905-6.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Benmatt Organization, Inc., designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. The Complaint.
2. Defendant's Answer to the Complaint.
3. Stipulation of Facts, including Exhibits 1-a, 1-b and 1-c referred to therein.
4. Opinion.
5. Findings of Fact and Conclusions of Law.
6. Objections to Defendant's proposed Findings of Fact and Conclusions of Law.
7. Order Overruling Plaintiff's Objections to certain evidence received at the Hearing.
8. Judgment, entered October 25, 1955.
9. Notice of Appeal, filed December 13, 1955.
10. Bond for Cost on Appeal.

11. Statement of Points on which Appellant intends to rely, served herewith.

12. This Designation.

Dated: This 11th day of January, 1956.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Plaintiff [40]

Affidavit of Service by Mail attached. [41]

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause No. 16905.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 41, inclusive, contain the original

Complaint;

Answer;

Stipulation of Facts; (16905-BH—16906-BH)

Opinion; (16905-BH—16906-BH)

Findings of Fact and Conclusions of Law; (16905-BH—16906-BH)

Objections to Defendant's Proposed Findings of Fact and Conclusions of Law; (16905-BH—16906-BH)

Order Overruling Plaintiff's Objection to Certain Evidence Received at the Hearing; (16905-BH—16906-BH)

Judgment;

Notice of Appeal;

Statement of Points; (16905-BH—16906-BH)

Designation of Contents of Record; (16905-BH—16906-BH which, together with a photostatic copy of Undertaking for Costs on Appeal and Plaintiff's exhibits 1-a, 1-b, 1-c, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 24th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk
/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 15007. United States Court of Appeals for the Ninth Circuit. Benmatt Organization, Inc., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 15007

BENMATT ORGANIZATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Civil No. 15008

BENMATT ORGANIZATION, INC.,
Appellant,

vs.

ROBERT A. RIDDELL, Director of Internal Revenue,
Appellee.

ADOPTION OF DESIGNATION OF RECORD AND STATEMENT OF POINTS

Appellant, Benmatt Organization, Inc., hereby adopts the Designation of Contents of Record on Appeal and Statement of Points appearing in the certified typewritten transcript of the record herein in the same manner and to the same extent as though herein fully set out.

RILEY and HALL,
/s/ By B. H. NEBLETT,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 8, 1956. Paul P. O'Brien, Clerk.